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No.

08-828

2009

IN THE **OFFICE OF THE CLERK**
Supreme Court of the United States

LEONARDO DIAZ,

Petitioner,

v.

SECRETARY FOR THE DEPARTMENT
OF CORRECTIONS, James McDonough,
ATTORNEY GENERAL OF THE STATE OF
FLORIDA, Bill McCollum,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL MORRIS
Counsel of Record
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33156
(305) 670-1441
Counsel for Petitioner

ROBERT A. ROSENBLATT
7695 SW 104th Street
Pinecrest, FL 33156
(305) 536-3300
Counsel for Petitioner

QUESTIONS PRESENTED

I.

Whether the resolution of the petitioner's double jeopardy claim is controlled by *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (the unconstitutional submission of a jeopardy-barred greater charge to a jury is not harmless beyond a reasonable doubt simply because the jury convicts on a lesser, but properly submitted, charge) rather than, as found by the state reviewing court, *Morris v. Mathews*, 475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) (jeopardy-barred conviction of greater offense by jury adequately remedied by reduction to conviction for lesser offense that was not jeopardy-barred).

II.

Whether the holding of the court of appeals -- that the state appellate court's rejection of the petitioner's double jeopardy claim could not involve an unreasonable application of Supreme Court law because "there is no Supreme Court law on point" with the petitioner's double jeopardy claim, and that the double jeopardy principles of *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) and *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957) do not constitute "clearly established Federal Law, as determined by the Supreme Court of the United States" within the meaning of 28 U.S.C. § 2254(d)(1) because, unlike the petitioner's case, neither decision "involved a hung jury" -- conflicts with *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (a state court

errs when it unreasonably refuses to extend a legal principle from Supreme Court precedent to a new context where it should apply) as well as *Illinois v. Somerville*, 410 U.S. 458, 464, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425 (1973) (in double jeopardy cases concerning the existence of manifest necessity for a mistrial, "... virtually all of the cases turn on the particular facts and thus escape meaningful categorization.").

III.

Whether the court of appeals, in conflict with *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (holding that in order to proceed with a retrial after a mistrial has been declared over the defendant's objection in the first trial, the prosecutor bears the "heavy burden" of demonstrating "manifest necessity"), erred in finding that a manifest necessity for mistrial existed based upon a mere possibility of what the petitioner's jury might have done.

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OPINION BELOW

A copy of the unpublished decision of the United States Court of Appeals for the Eleventh Circuit, *Diaz v. Secretary, Department of Corrections*, 2008 WL 2620194 (11th Cir.2008), affirming the denial of the petitioner's 28 U.S.C. § 2254 habeas corpus petition by the United States District Court for the Southern District of Florida, is contained in the Appendix. (App. 1-12).

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was filed on July 3, 2008. (App. 1-12). A timely filed application for extension of time for filing this petition for writ of certiorari was granted to February 12, 2009. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment provides in relevant part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

The facts as related by the United States Court of Appeals for the Eleventh Circuit are as follows:

"[Petitioner] Diaz was indicted for premeditated [first-degree] murder. At the conclusion of his jury trial on this charge, the state trial court instructed the jury:

In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crime(s) of which he is accused, there may be evidence that he committed other acts that would constitute a lesser included crime. Therefore, if you decide that the main accusation [of first-degree murder] has not been proved beyond a reasonable doubt, you will next decide if the defendant is guilty of any lesser included crime. The lesser included crimes indicated in the definition of First-degree murder are: second-degree murder [and] manslaughter. [emphasis supplied]

"After deliberating, the jury informed the state trial court that it could not reach a unanimous verdict, as 11 jurors felt the evidence supported a second-degree-murder conviction, while one juror 'was holding out for manslaughter.' The state trial court gave the jury an '*Allen* charge,' and the jury continued deliberating the next day. The jury later returned, however, and informed the state trial court that it still could not reach a unanimous verdict. The jury did not explain its division, and the state trial court asked that the jury express in a note that it was deadlocked, without any indication of its division. The state trial court judge and the attorneys met in chambers. Diaz requested that the state trial court either poll the jurors on whether they had reached a verdict on the first-degree-murder charge or ask that the jurors return a verdict form indicating their verdict as to its charge. [The verdict form only presented the jury with the options of finding the petitioner guilty of first-degree murder, guilty of second-degree murder, guilty of manslaughter, or not guilty.] The state trial court declined, in accordance with its custom to refuse to

take a verdict on the greater offense when the jury is hung on the lesser-included offenses, and declared a mistrial.

"The state then moved to retry Diaz for first-degree murder. Diaz moved to dismiss the charge, on the ground that the jury at the first trial implicitly acquitted him of this charge. The state trial court denied the motion. At the close of the state's evidence at the second trial, Diaz renewed his motion to dismiss on double jeopardy grounds. The state trial court denied the motion. At the close of the evidence and instructions, the jury began deliberations. At some point in the deliberations, the jury indicated that its members were split, six voting for a second-degree-murder verdict and six voting for a not-guilty verdict. After resuming deliberations the following day, the jury found Diaz guilty of manslaughter.

"On direct appeal to the state appellate court, Diaz argued the following. The state trial court *sua sponte* granted a mistrial without exploring the alternatives or finding manifest necessity for a mistrial. Thus, pursuant to Supreme Court law, his retrial for first-degree murder was prohibited by the Double Jeopardy Clause. Also, the jury's indication that it was deadlocked as to the lesser-included offenses, coupled with the jury's instruction not to consider the lesser-included offenses unless it found that the evidence did not support a first-degree-murder conviction, demonstrated that the jury 'impliedly acquitted' Diaz of first-degree murder, such that he should not have been retried on this charge. The fact that he ultimately was convicted of a lesser-included offense at his second trial does not render his retrial for a jeopardy-barred offense harmless, as he should not have been put through the ordeal of a second

first-degree-murder trial and because it could not be said that the first-degree-murder charge did not influence the jury to convict him of manslaughter. Accordingly, reversal of his conviction and retrial for only manslaughter were necessary.

"The state appellate court per curiam affirmed Diaz's conviction, without reasoning save citations to [*Morris v. Mathews*, [475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986)] and *Commonwealth v. Roth*, 437 Mass. 777, 776 N.E.2d 437 (2002), and *A Juvenile v. Commonwealth*, 392 Mass. 52, 465 N.E.2d 240 (1984). See *Diaz v. State*, 844 So.2d 655, 656 (Fla.Dist.Ct.App.2003)." (App. 2-5). The petitioner timely petitioned for review of his double jeopardy claim in the Supreme Court of Florida which was dismissed on June 23, 2003. (App. 15).

The petitioner timely filed with the district court a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (App. 28-46). The district judge entered an order denying the petition. (App. 13-27). In pertinent part, the district judge reasoned that the petitioner's double jeopardy rights were not violated when the state trial court granted a mistrial and retried the petitioner for first-degree murder because the first jury was deadlocked. *Id.*

The petitioner timely appealed to the Eleventh Circuit. Based upon the foregoing facts quoted from the decision of the court of appeals, the Eleventh Circuit found that the petitioner did not meet his burden to demonstrate, under 28 U.S.C. 2254(d)(1), that the state appellate court's affirmance of his conviction was contrary to the law as clearly established by this Court because "there is no Supreme Court law on point" that "involve[s] a hung jury." (App. 11). The Eleventh Circuit further found that although the jury remained deadlocked after the Allen charge, it was "possible"

that the jury had revisited the first-degree murder issue thereafter. (App. 12).

ARGUMENT

I.

The resolution of the petitioner's double jeopardy claim is controlled by *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970) (the unconstitutional submission of a jeopardy-barred greater charge to a jury is not harmless beyond a reasonable doubt simply because the jury convicts on a lesser, but properly submitted, charge) rather than, as found by the state reviewing court, *Morris v. Mathews*, 475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986) (jeopardy-barred conviction of greater offense by jury adequately remedied by reduction to conviction for lesser offense that was not jeopardy-barred).

A. AEDPA Standards

The petitioner's double jeopardy claim arises in the context of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254. Under the AEDPA, if a state court has adjudicated a claim against the petitioner, a federal court may grant habeas relief only if the state court's adjudication was contrary to, or an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 403-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The unreasonable application clause from § 2254 is highly

deferential to state courts. Under this standard, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly," *Woodford v. Visciotti*, 537 U.S. 19, 24-25, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002) (citation omitted), or even if it finds the state court's actions to be "clear error." *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Nevertheless, this standard does allow the issuance of the writ for state court actions that are "objectively unreasonable." *Id.* In defining what is unreasonable, this Court has remarked that every application of law has a certain range of reasonableness, but that ultimately "[t]he term 'unreasonable' is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Yarborough v. Alvarado*, 541 U.S. 652, 124 S.Ct. 2140, 2149, 158 L.Ed.2d 938 (2004) (citing *Williams v. Taylor*, 529 U.S. at 410-11).

Here, neither the state trial court nor state reviewing court provided any reasons for rejecting the petitioner's double jeopardy claim. In such a case, the deferential standard of review prescribed by the AEDPA does not apply because the federal court's review of the petitioner's claim is "not circumscribed by a state court conclusion...". *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

B. The Applicable Double Jeopardy Law

A state is prohibited from placing a criminal accused twice in jeopardy for the same offense. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The primary rationale underlying this constitutional protection is that a state must not be permitted "to make repeated attempts to convict an

individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). Because, however, "[t]he prohibition is not against being twice punished, but against being twice put in jeopardy," *Ball v. United States*, 163 U.S. 662, 669, 16 S.Ct. 1192, 41 L.Ed. 300 (1896), "it is not ... essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge." *Green*, 355 U.S. at 188, 78 S.Ct. 221. Rather, "in a jury trial jeopardy attache[s] when the jury is empaneled and sworn." *Crist v. Bretz*, 437 U.S. 28, 38, 98 S.Ct. 2156, 2159, 57 L.Ed.2d 24 (1978).

In *Green*, the defendant was indicted on charges of arson and first-degree murder. At trial, the jury was instructed that it could find the defendant guilty of either first-degree murder or second-degree murder under the first-degree murder count. *Id.* at 185-86. The jury convicted the defendant of arson and second-degree murder but rendered no verdict on the charge of first-degree murder. On appeal, the second-degree murder conviction was reversed, and on remand the defendant was tried and convicted of first-degree murder as charged in the original indictment. *Id.* at 186. This Court held that double jeopardy prohibited the defendant's conviction for first-degree murder. This Court noted that the jury gave no indication that it was deadlocked or unable to reach a verdict as to the first-degree murder charge; rather it was simply "silent" as to that charge. *Green*, 355 U.S. at 186, 190-91. This Court thus concluded that the jury's silence on first-degree murder coupled with its conviction of the

defendant on second-degree murder was an "implicit acquittal" of the first-degree murder charge, thus terminating jeopardy. *Id.* at 190. Moreover, "the jury was dismissed without returning any express verdict on that charge [of first-degree murder] and without Green's consent." *Id.* at 191. It therefore followed that "... Green's jeopardy for first-degree murder came to an end when the jury was discharged so that he could not be retried for that offense." *Id.*

Of course, this Court has never held that "every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." See *Wade v. Hunter*, 336 U.S. 684, 688, 69 S.Ct. 834, 93 L.Ed. 974 (1949). Rather, this Court has stated "that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 689. See also *United States v. Jorn*, 400 U.S. 470, 480, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) ("[A] mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide."). Nevertheless, because a criminal defendant's right to have his trial completed by a particular tribunal is substantial, and any mistrial frustrates that right, the prosecution must overcome a heavy burden in justifying a mistrial over the defendant's objection if the double jeopardy bar is to be avoided. As early as 1824, this Court stressed that "the power (to declare a mistrial) ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *United States v. Perez*, 22 U.S. (9

Wheat). 579, 6 L.Ed. 165 (1824).

Accordingly, from *Perez* to date, it has been the clearly established law of this Court that where a judge declares *sua sponte* a mistrial on a charge without a defendant's consent and where all possible alternatives were not considered, employed and found wanting, retrial on that charge is barred by the Double Jeopardy Clause. *Perez, supra* (unless there is a "manifest necessity" for declaring a mistrial without a defendant's consent, retrial is barred under the Double Jeopardy Clause). *Accord, Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976); *Illinois v. Somerville*, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); *Jorn*, 400 U.S. at 485, 91 S.Ct. at 557. In other words, when a jury has been discharged without consent of the defendant and without a manifest necessity, the discharge is the equivalent of an acquittal and retrial is prohibited.

A jury deadlock can give rise to a manifest necessity for a mistrial. *See, e.g., Logan v. United States*, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892) (reprosecution not barred where jury discharged after 40 hours of deliberation for inability to reach a verdict). However, in such a case, a "high degree" of necessity is required to establish a mistrial due to the hopeless deadlock of jurors, *Washington*, 434 U.S. at 506, and the record must reflect that the jury is "genuinely deadlocked." *Richardson v. United States*, 468 U.S. 317, 324-25, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984).

C. The Absence of Manifest Necessity, the Presence of an Implied Acquittal.

Here, the record is devoid of any showing of a manifest necessity for the trial judge's declaration of mistrial *on the charge of first-degree murder* over the petitioner's objection. Any suggestion that the mistrial was justified due to a jury deadlock fails because the jury wrote in a note to the trial judge that it was deadlocked between the two lesser included charges. The record shows no deadlock as to the charge of first-degree murder.

To the contrary, the record shows an implied acquittal on the charge of first-degree murder. The jury was instructed to consider the lesser charges only if there was reasonable doubt as to the petitioner's guilt of first-degree murder (often referred to as an "acquittal-first" or "hard transition" instruction). "A jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 733, 145 L.Ed.2d 727 (2000). Thus, the announced deadlock as to the two lesser charges, coupled with the instruction, meant that the jury determined prior to consideration of the lesser charges that there was reasonable doubt as to the petitioner's guilt of first-degree murder, notwithstanding the absence of an express verdict on the charge of first-degree murder. *See Green* (jury's silence on first-degree murder coupled with conviction on second-degree murder constituted an implied acquittal of first-degree murder thereby rendering retrial on first-degree murder charge jeopardy-barred).

The record here is not simply devoid of the high degree of necessity and evidence of genuine deadlock required by this Court's decisions in *Washington* and *Richardson* to have warranted a mistrial on the first-degree murder charge, the record squarely refutes any

such necessity. Of course, the jury's genuine deadlock as to second-degree murder and manslaughter warranted a mistrial declaration, but only upon those charges. Thus, a new trial on the higher charge of second-degree murder is not jeopardy-barred. But the retrial of the petitioner on first-degree murder was violative of this Court's clearly established double jeopardy jurisprudence.

D. The Petitioner's Double Jeopardy Claim is Controlled by *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970), not *Morris v. Mathews*, 475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986).

The state reviewing court, in its per curiam affirmance without opinion, rejected the petitioner's federal double jeopardy claim, citing *Morris v. Mathews*, 475 U.S. 237, 246, 106 S.Ct. 1032, 89 L.Ed.2d 187 (1986). In *Mathews*, although a jeopardy-barred offense was submitted to the jury, relief was not afforded the defendant due to an absence of prejudice based upon the particular facts of that case. Upon the distinguishing facts of the petitioner's case, however, the controlling decision on the issue of prejudice is *Price v. Georgia*, 398 U.S. 323, 90 S.Ct. 1757, 26 L.Ed.2d 300 (1970).

The defendant in *Price* was charged with murder and the jury found him guilty of the lesser offense of manslaughter. The manslaughter conviction was reversed. Price was retried for murder and reconvicted of manslaughter. This Court held that the retrial for murder violated the Double Jeopardy Clause. The state argued that the double jeopardy violation was harmless because the jury convicted Price of manslaughter rather than the jeopardy-barred offense

of murder. This Court rejected the state's argument. The following reasoning from *Price* is directly on point with the petitioner's case:

The Double Jeopardy Clause ... is cast in terms of the risk or hazard of trial and conviction, not of the ultimate legal consequences of the verdict. To be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly. *Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence.*

Id. at 331, 90 S.Ct. at 1762 (emphasis supplied). This Court vacated *Price*'s manslaughter conviction and ordered a retrial on the manslaughter charge only.

Instead of applying *Price*, the state appellate court applied *Mathews* which is so clearly inapposite that in relying upon that decision rather than *Price*, the state court holding was "contrary to ... clearly established Federal law, as established by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). In *Mathews*, the defendant appealed a conviction of aggravated murder, claiming his prosecution for the crime following a separate conviction for the underlying crime of aggravated robbery violated double jeopardy principles. The Ohio Court of Appeals agreed with the defendant but entered judgment against him on the lesser included offense of murder in accordance with an Ohio rule of criminal procedure.

Upon review, this Court found no constitutional infirmity to the Ohio practice because the defendant failed "to demonstrate a reasonable probability that he would not have been convicted of the non-jeopardy-barred offense absent the presence of the jeopardy-

barred offense." 475 U.S. at 247, 106 S.Ct. at 1038. This Court explained that the presumption of prejudice that was present in *Price* was absent in Mathews' case because "[t]he jury did not acquit Mathews of the greater offense of aggravated murder, but found him guilty of that charge and, a fortiori, of the lesser offense of murder as well." *Id.* (emphasis supplied).

In *Mathews*, this Court distinguished *Price* from cases in which the jury did not acquit the defendant of the greater offense, but found the defendant guilty of the greater offense and, by implication, the alternative lesser offense. In such cases, the burden rests upon the defendant to establish that being tried twice for the greater offense tainted the conviction of the lesser offense. As this Court held in *Mathews*: "*Price* did not impose an automatic retrial rule.... Rather, the Court relied on the likelihood that ... the charge of the greater offense for which the jury was unwilling to convict also made the jury less willing to consider the defendant's innocence on the lesser charge.... The jury did not acquit Mathews of the greater offense ... but found him guilty of that charge and, *a fortiori*, of the lesser offense of murder as well." *Mathews*, 475 U.S. at 246.

Unlike in *Mathews*, the petitioner's jury did *not* convict him of the greater offense of first-degree murder. Rather, he was impliedly acquitted for the reasons previously stated. Moreover, the state trial judge *sua sponte* declared a mistrial, over the petitioner's objection, as to first-degree murder, even though the jurors announced no deadlock as to that charge.

Furthermore, the jury in the petitioner's second trial indicated that it was split, six voting for a second-degree-murder verdict and six voting for a not-guilty verdict. After resuming deliberations the

following day, the jury found petitioner guilty of manslaughter. Thus, precisely as this Court stated in *Price*: "[W]e cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence." *Id.* at 331, 90 S.Ct. at 1762.

In view of the striking similarity of this case to *Price* and the clear factual distinctions between the petitioner's case and *Mathews*, the clearly established rule of law of this Court that applies is *Price*. Accordingly, the decision of the state reviewing court is contrary to the clearly established precedent of this Court, thereby warranting federal habeas corpus relief under 28 U.S.C. § 2254(d)(1) in the form of a new trial on the charge of the non-jeopardy-barred offense of second-degree murder.

In addition to citing *Mathews*, the state reviewing court cited two Massachusetts decisions, *Roth, supra*, and *A Juvenile, supra*. However, these decisions neither address or resolve a federal double jeopardy claim such as the petitioner's, but merely interpret and apply Massachusetts criminal procedural rules. Moreover, the court in *Roth* effectively distinguished cases such as the petitioner's by noting that its analysis of the Massachusetts criminal procedure matter at issue would be different if, as in other jurisdictions, the jurors had been instructed not to consider lesser included offenses unless they first decided there was reasonable doubt as to the main accusation. *Roth*, 437 Mass. at 794, 776 N.E.2d at 449, n. 14. Florida is one of those other jurisdictions and the petitioner's jury was so instructed.

II.

The holding of the court of appeals conflicts with *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) and *Illinois v. Somerville*, 410 U.S. 458, 464, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425 (1973).

A. The Conflict with *Williams*

Whereas the state reviewing court relied upon this Court's decision in *Mathews* (thereby impliedly finding that there was a double jeopardy violation but that it was adequately remedied by the jury's conviction on a lesser charge), the Eleventh Circuit ruled that *Mathews*, *Price* and *Green* do not apply at all. In fact, the Eleventh Circuit reasoned that because none of the decisions of this Court relied upon by the petitioner involved a hung jury, the decision of the state appellate court could not be an unreasonable application of this Court's decisions because the petitioner's double jeopardy claim required an extension, rather than an application, of this Court's double jeopardy jurisprudence. (App. 12). The Eleventh Circuit's decision conflicts with *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

Under the AEDPA, a federal court may not grant a writ of habeas corpus to a petitioner in state custody with respect to any claim adjudicated on the merits in the state court unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court...". 28 U.S.C. § 2254(d)(1). In *Williams*, this Court warned that "clearly established Federal law, as determined by the Supreme Court"

refers to Supreme Court decisions, not those of lower federal courts, and "refers to the holdings, as opposed to the dicta, of [the] Court's decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412. However, "clearly established law" does not mean the petitioner must produce a decision of this Court that is factually identical to his. As this Court also stated, a state court decision makes "an unreasonable application of this Court's precedent" when the court "unreasonably extends a legal principle from our precedent to a new context where it should not apply ..." but significantly, this Court added that a lower court also errs when it "unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407 (emphasis added).

In conflict with *Williams*, the Eleventh Circuit held the petitioner to a higher and different standard, requiring him to produce a decision of this Court factually identical to his, *i.e.*, involving a hung jury. Instead, the Eleventh Circuit should have recognized that the law applicable to the petitioner's double jeopardy claim, which was established by this Court as early as 1824 in *Perez*, applies to the context of the petitioner's case. This Court held in *Perez* that where a judge declares *sua sponte* a mistrial on a charge without a defendant's consent and where all possible alternatives were not considered, employed and found wanting, retrial on that charge is barred by the Double Jeopardy Clause. *Accord*, *Washington, supra*; *Dinitz, supra*; *Somerville, supra*; *Jorn, supra*. This line of authority from this Court established a principle of law that applies to the petitioner's case -- without regard to the first jury's deadlock as to second-degree murder and manslaughter -- because the mistrial declaration as to first-degree murder was without the petitioner's consent and without consideration of the alternatives

to mistrial.

Furthermore, the Eleventh Circuit's double jeopardy analysis -- that the decisions of this Court relied upon by the petitioner were "readily distinguishable" because the juries in those cases convicted the defendant's whereas the first jury in this case was deadlocked -- is flawed. In *Green*, this Court stated that "it is not ... essential that a verdict of guilt ... be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge." *Green*, 355 U.S. at 188, 78 S.Ct. 221. Rather, "in a jury trial jeopardy attache[s] when the jury is empaneled and sworn." *Crist*, 437 U.S. at 38. Here, jeopardy attached after the jury was sworn at the petitioner's first trial. The jeopardy violation took place when the mistrial was declared upon the charge of first-degree murder over the petitioner's objection, in the absence of manifest necessity, and without exploration of the alternatives to mistrial.

B. The Conflict with *Somerville*

Nor can the Eleventh Circuit's reasoning be squared with the law of this Court that in double jeopardy cases concerning the existence of manifest necessity for a mistrial, "... virtually all of the cases turn on the particular facts and thus escape meaningful categorization." *Illinois v. Somerville*, 410 U.S. 458, 464, 93 S.Ct. 1066, 1070, 35 L.Ed.2d 425 (1973). Given the fact-specific nature of double jeopardy claims such as the petitioner's, the reasoning of the Eleventh Circuit would render immune from federal habeas corpus relief state court double jeopardy violations resulting from mistrial declarations unsupported by manifest necessity simply because of unique facts where double jeopardy principles from

this Court were otherwise clearly applicable.

III.

The court of appeals erred in finding a manifest necessity for mistrial based upon a mere possibility of what the jury might have done after the *Allen* charge.

While recognizing that the jury's announced deadlock as to the lesser charges indicated that "it did not think Diaz should be convicted of first-degree murder" (App. 12), the Eleventh Circuit went on to state that after the *Allen* charge, it was "not clear that the jury, at this point also, did not think Diaz should be convicted of first-degree murder," even though the jury announced that it remained deadlocked." (App. 12). Thus, the Eleventh Circuit reasoned, it was "*possible* that the jury concluded that first-degree murder was not proved and began to discuss the lesser-included offenses on the first day of deliberations, but then revisited the first-degree murder issue on the second day of deliberations. Thus, the facts did not demonstrate an implicit acquittal sufficiently enough to call for an extension of established law." (App. 12) (emphasis supplied).

In *Washington*, this Court recognized that a defendant's right, pursuant to the Double Jeopardy Clause, to have his trial, once commenced, completed by a particular tribunal, is a "valued right," but one which must sometimes "be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 503 n.11. To proceed with a retrial after a mistrial has been declared over the defendant's objection in the first trial, the prosecutor bears the "heavy burden" of demonstrating "manifest necessity."

Id. at 505.

The Eleventh Circuit's holding on this point is in direct conflict with *Washington* by effectively relieving the prosecution of its heavy burden. Instead, the Eleventh Circuit engaged in pure speculation as to a "possibility" of what the jurors might have done after the *Allen* charge. However, weighing against that conjecture is what the record does show, namely, that the jurors were not deadlocked as to the charge of first-degree murder, that the jurors had in fact impliedly acquitted the petitioner of that charge, and that there was no showing whatsoever of any manifest necessity for a mistrial on the charge of first-degree murder. This conflict presents yet another reason for granting certiorari review.

One other aspect of the Eleventh Circuit's decision is also worthy of consideration. That court also ruled that the question of whether the state trial court erred in declaring a mistrial was beyond the scope of the Certificate of Appealability because the COA "asks only whether the state trial court violated the Double Jeopardy Clause by retrying [petitioner] for a charge of which the first jury impliedly acquitted him and, if so, whether he was prejudiced by this and merits a new trial for the lesser-included offenses only." (App.10).

This ruling demonstrates yet another fundamental misunderstanding of the double jeopardy issue by the Eleventh Circuit. The determination of manifest necessity is clearly inextricably intertwined with the implicit acquittal issue because there could be no manifest necessity for mistrial on the charge of first-degree murder without a genuine deadlock as to that charge -- and there could be no genuine deadlock if the jury implicitly acquitted on that charge.

CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

PAUL MORRIS
Law Offices of
Paul Morris, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33156
(305) 670-1441
Counsel for Petitioner

ROBERT A. ROSENBLATT
ESQ.
7695 S.W. 104th Street
Pinecrest, FL 33156
(305) 536-3300
Counsel for Petitioner

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